BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN JOSEPH RANJEL	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,046,841 &
ARC MANAGEMENT SERVICES	)	1,046,842
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 19, 2009, preliminary hearing Order For Compensation of Administrative Law Judge Brad E. Avery (ALJ). Claimant was awarded temporary total disability compensation (TTD) commencing November 15, 2009, and continuing until the independent medical evaluation report is received. The Order allowed that TTD may be extended depending on the outcome of the report. The ALJ found claimant to be a credible witness regarding his alleged injuries while working for respondent. Respondent also appeals the November 19, 2009, Order Referring Claimant For Independent Medical Evaluation which authorized the Dickson-Dively Orthopaedic Clinic to evaluate claimant regarding his alleged injuries and for recommendations regarding any disability rating from those injuries and any future medical treatment and/or restrictions found to be appropriate, if any.

Claimant appeared by his attorney, James L. Wisler of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Joseph R. Ebbert of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held November 17, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Respondent argues that claimant has failed to prove that he suffered either of the alleged accidental injuries claimed in this matter while claimant was working for respondent. Respondent alleges that claimant's descriptions of the alleged accidents are not credible. Respondent further alleges that the descriptions of the accidents provided by claimant are contradicted by the evidence uncovered by respondent's employees.

2. Respondent disputes claimant's entitlement to TTD and future medical treatment, both due to issue number 1, alleging that the ALJ exceeded his jurisdiction in granting the benefits. Additionally, respondent argues that claimant was receiving unemployment compensation through November 14, 2009. Therefore, TTD awarded effective November 15, 2009, is not justified.

3. Respondent argues that the ALJ exceeded his jurisdiction in ordering an independent medical evaluation as claimant has failed to prove that he suffered accidental injuries which arose out of and in the course of his employment with respondent.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order For Compensation and the Order Referring Claimant For Independent Medical Evaluation should be affirmed.

Claimant began working for respondent in September 2008 as a maintenance employee in respondent's 280- to 300-unit mobile home park. Claimant was the only maintenance worker on the premises. On July 21, 2009, claimant was assigned to prepare a unit, unit 283-R, for a new tenant. At some point, claimant went outside and began trimming a tree with a long-handled pole saw. While trimming the tree, claimant experienced pain in his right shoulder. He advised his supervisor, Leslie Byrd Keller, respondent's assistant manager, of the shoulder pain and was sent to the Lawrence Memorial Hospital emergency room. There, claimant was diagnosed with right shoulder pain, placed in a sling, restricted to one-handed duty and referred to board certified orthopedic surgeon Douglass E. Stull, M.D. Dr. Stull saw claimant on July 23, 2009, and diagnosed shoulder instability. Later, board certified orthopedic surgeon Edward J. Prostic, M.D., diagnosed a possible SLAP lesion and rotator cuff irritability.

Claimant returned to work for respondent with the light-duty restrictions on July 22, 2009. He was assigned the task of picking up trash on respondent's mobile home grounds. Claimant, at some point, began picking up trash near the maintenance shed. This required that he pick up heavier trash than was found in the mobile home park. Claimant began experiencing low back pain. Claimant also testified that he was told by

respondent's community manager, Texie Strange, to go to the pool store and buy chemicals for the pool. These chemicals weighed between 25 and 50 pounds and lifting these caused claimant additional injury to his low back. He then proceeded to Prompt Care for an evaluation of the back pain. When Prompt Care contacted respondent, they were denied authorization to treat claimant as respondent's representatives were unaware that claimant was injured. For reasons unknown, claimant failed to report to work on July 23, 24 and 25. On July 27, 2009, claimant was terminated for failure to report to work. Respondent contends several attempts to contact claimant were unsuccessful. At one point, claimant's wife was contacted, but respondent received no return call from claimant.

Respondent disputes claimant's descriptions of both alleged accidents. Ms. Strange testified that claimant was not assigned the task of trimming trees on July 21, 2009. He was to clean the interior of a unit in preparation for new tenants. Also, Mr. Keller testified that respondent did not own a tree trimming tool as was described by claimant. Additionally, when he checked the unit where claimant was told to clean, there was no such tool and no freshly cut tree branches. There was a branch that had been torn from a tree, but not cut. Mr. Keller agreed that tree trimming would be part of claimant's normal job duties. Mr. Keller agreed that claimant did not appear to have a shoulder injury when he talked to him the morning of July 21, 2009. When both Ms. Strange and Mr. Keller saw claimant later, he did have his arm in a sling. Claimant acknowledged that he was not instructed to trim trees on July 21, 2009, but stated that tree trimming was part of his job duties and it needed to be done.

Ms. Strange also testified that claimant was not assigned to clean near the maintenance shed. He was to clean the trash in the streets of respondent's mobile home park. She also denies that claimant was sent to the pool store, although claimant's company pickup did contain a bucket of chemicals from the pool store purchased on the day claimant alleges he injured his back. Ms. Strange also disputes claimant's testimony that a large "roll off" trash container was near the maintenance shed. The trash container was alleged to not arrive until August, after claimant's termination.

Mr. Keller was aware that claimant was to pick up trash. He was surprised when a call arrived on the morning of July 22, 2009, from Prompt Care requesting the authorization to treat claimant's back. He was not even aware that claimant had left the mobile home park. Claimant had testified that it was Mr. Keller who authorized the trip to Prompt Care in the first place, but this is denied by Mr. Keller. Respondent's Exhibit B to the preliminary hearing lists the health care facilities authorized to treat work-related injuries. Prompt Care is not listed on Exhibit B.[1] After Prompt Care was refused authorization to treat claimant's low back, claimant returned to respondent's mobile home park, leaving his work pickup and taking his private vehicle to the emergency room at Lawrence Memorial Hospital. When

[1] According to the testimony provided by Ms. Strange, this notice was posted in her office. See P.H. Trans. at 77.

Ms. Strange and Mr. Keller found the pickup with the window open, the keys in the vehicle and the vehicle not secured, they took the pickup back to the office.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

The accident descriptions provided by claimant are generally credible. While respondent contends that claimant was not instructed to trim trees on July 21, 2009, there is no dispute that tree trimming was, at times, part of claimant's job description. Additionally, the medical records created contemporaneous with the alleged injuries are not in conflict with claimant's testimony. Likewise, whether claimant was picking up trash in the streets or in the maintenance shed area, both were part of claimant's job responsibilities. Respondent's contentions in this matter are not so much that claimant was

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[2] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2009 Supp. 44-501(a).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

doing a forbidden act, but rather that claimant was doing his job in a prohibited manner or at a forbidden time. Kansas law makes a distinction between whether the work being performed at the time of an accident was forbidden or whether the work was being performed in a forbidden manner.

> If an employee is performing work which has been forbidden, as distinguished from doing his work in a forbidden manner, he is not acting in the course of his employment.[6]

Here, the activities described by claimant that led to the injuries were not forbidden, merely being done at an inappropriate time. While there are questions remaining in this record as to the events leading to these alleged injuries, this Board Member finds claimant's testimony, for preliminary purposes, to be persuasive. Claimant has proven that he suffered injuries to his right shoulder and low back which arose out of and in the course of his employment with respondent.

Respondent contends that claimant should not be entitled to TTD, ongoing medical treatment and a referral for an independent medical evaluation. However, all of the disputed actions by the ALJ are actions well within the jurisdiction of an administrative law judge at a preliminary hearing.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[7]

The Board's jurisdiction is limited to a defined set of issues when an appeal from a preliminary hearing is filed. As the ALJ did not exceed his jurisdiction in awarding TTD and future medical treatment and in making a referral for an independent medical evaluation, the Board is without jurisdiction to decide these issues on appeal from a preliminary

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[6] *Hoover v. Ehrsam Company*, 218 Kan. 662, Syl. ¶ 2, 544 P.2d 1366 (1976).

[7] K.S.A. 44-534a(a)(2).

hearing Order. This Board Member finds that the appeal by respondent on these issues should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven, for preliminary hearing purposes, that he suffered accidental injuries on July 21, 2009, to his right shoulder and on July 22, 2009, to his low back, both of which arose out of and in the course of his employment with respondent. Respondent's appeal of the award of TTD, ongoing medical care and a referral for an independent medical evaluation is dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated November 19, 2009, and the Order Referring Claimant For Independent Medical Evaluation dated November 19, 2009, should be, and are hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2010.

HONORABLE GARY M. KORTE

c: James L. Wisler, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[8] K.S.A. 44-534a.